

His Majesty's Advocate for *Scotland*, on Behalf of } Appellant.
 His Majesty, - - - - - }

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James Boyd of *Kilmarnock* and *Callendar*, Esq;
 commonly called *Lord Boyd*; *Mr. Harry Home*
 of *Kaims*, Advocate; *Mr. William Wallace* of
Cairnhill, Advocate; *Mr. Hew Crawford* Clerk } Respondents.
 to the Signet, and *Robert Paterson* Writer in
Kilmarnock, Trustees of the said *James Boyd*,

The Appellant's C A S E.



HAT *William* late Earl of *Kilmarnock* having been attainted of High Treason in the late Rebellion begun in 1745, in Favour of the Pretender, the Lands, Lordship and Barony of *Kilmarnock*, in which he was seised, were, in Pursuance of an Act of the Twentieth Year of his present Majesty, seised and surveyed for the Use of his Majesty, by Order of the Barons of the Court of Exchequer in *Scotland*.

That a Claim, was presented to the Court of Session in Name or on Behalf of the Respondent, or of certain Trustees for him, to the said Lands, Lordship and Barony of *Kilmarnock*, founded upon a voluntary Deed of Disposition or Conveyance made by the said late Earl, bearing Date the 10th Day of *August* 1732, of the said Estate to the Respondent his eldest Son, and the Heirs Male of his Body; which failing, to his other Sons in their Order, and their Heirs Males of their Bodies with the last Limitation to his own right Heirs, reserving the Life-rent of the whole Estate to him the said late Earl, and also a Power or Faculty to charge the Estate for Provisions to his younger Children, not exceeding a Sum therein limited, and further reserving Power to the said Earl, with Consent of certain Friends in the said Disposition named, to charge the Estate, or even to sell Parts of it for Payment of the Debts of the said Earl or his Predecessors that were then subsisting or standing out.

That to this Claim, Answers and Defences were made by the now Appellant on Behalf of his Majesty, bearing, that by an Act of the First Year of the late King, (entituled, An Act for encouraging all Superiors, Vassals, Landlords and Tenants in *Scotland*, who do and shall continue in their Duty and Loyalty to his Majesty King *George*, and for discouraging all Superiors, &c. who have been or shall be guilty of Rebellious Practices against his said Majesty, and for making void all fraudulent Entails, Tailzies and Conveyances made there for barring or excluding the Effect of Forfeitures that may have been, or shall be incurred there on any such Account, &c.—) after the Sections relating to the Encouragements given to Superiors and Vassals, it was further Enacted as follows :

“ That whereas there was Reason to believe, that several Persons intending
 “ to commit High Treason or Treasons, as aforesaid, have made Tailzies,
 “ Entails or Settlements of their Estates in Favour of their Children or other
 “ Heirs

" Heirs of Tailzie, or Conveyances, Securities or Alienations, with a fraudulent Intent to avoid the Punishment of the Law due to the Offences above-mentioned, therefore, that all Tailzies, Entails, Settlements and Conveyances in Favour of the Granters Children, or other Heirs of Tailzie, or Trusts, Securities or Alienations of any Estates or Inheritances made in Scotland in the Name of whatsoever Person or Persons, since the 1st Day of August 1714, or which shall be made there in Time coming, by any Person or Persons who shall be convicted and attainted of any such High Treason or Treasons aforesaid, shall be, and they are thereby declared void and null to all Intents and Purposes, excepting such Deeds, Securities and Alienations as have been made since the Time aforesaid, or shall be made there in Time coming, for just and onerous Causes, the said onerous Causes being always otherwise instructed than by the Writings themselves."

And in the Terms of this Law the Appellant alledged, That the Conveyance made by the late Earl of *Kilmarnock* of his Estate, in Favour of the now Respondent his eldest Son, was made after the 1st Day of August 1714, and by a Person who was since convicted and attainted of High Treason, in the late Rebellion in Favour of the Pretender; and as it was not made for onerous Causes, nor any Evidence set forth on the Part of the Respondent, for instructing such onerous Causes, it followed, that the said Conveyance under which he claimed, was, by the said Statute, declared void and null to all Intents and Purposes, and consequently could not support or maintain his Claim.

1749. June 20.

The Lords of Session having advised the Claim for *James Boyd* and his Trustees, and Answers and Defences for his Majesty's Advocate, and heard Parties Procurators thereon, BEFORE ANSWER, ordained the Procurators for the Claimant to give in a Condescendence of the onerous Causes by which the Deed is supported, and the Way and Manner of proving the same, and of all other Facts and Circumstances for supporting thereof.

That upon this the Claimant now Respondent exhibited what was called a Condescendence (or Particular) of the onerous Causes of the Disposition of the Lands and Barony of *Kilmarnock*, granted by *William late Earl of Kilmarnock*, in Favour of his eldest Son *James Lord Boyd*, which consisted of an Account or List of the Debts or Burdens upon the Estate, or that were due by the said late Earl, computing, *inter alia*, the Eventual Jointure of the Countess his Wife, and the Sum intended for Provisions to his younger Children; all which were computed to amount to a larger Sum than the total Value of the Estate, as reckoned by the said Claimant now Respondent.

That to this Condescendence, Answers were made for the Appellant, containing Remarks upon the Facts stated in the Condescendence, in order to show, that even upon the Plan thereof, it was erroneous, and that the Estate in Question exceeded considerably in Value all the Debts and Incumbrances upon it; but chiefly insisting, in Point of Law, that it not being alledged, or any Proof offered, that the Claimant paid or gave any Price or valuable Consideration whatever out of his own Money, or any separate Estate of his, to the said late Earl, for making the Disposition under which he now claimed, it could not be maintained that the same was made for just and onerous Causes, in the true Sense of the said Act of the First of the late King, because there was nothing given for that Disposition by the Disponee or Receiver thereof.

1749. July 27.
appealed from.

The Lords of Session having advised the Claim given in for *James Boyd of Kilmarnock*, Answers thereto on the Part of his Majesty's Advocate, with the Vouchers produced for instructing the Onerosity of the Disposition claimed upon, and having heard Parties Procurators at the Bar, THEY SUSTAIN the Claim and DECERN and DECLARE accordingly, and ordain the Sheriff, within whose Jurisdiction the Estate claimed lies, forthwith to put the Claimant in Possession thereof, if he be not already in Possession.

The Appellant conceiving that his Majesty is aggrieved by the said Interlocutor and Decree of the 27th of July 1749, hath brought his Appeal against the same to your Lordships, in Pursuance of the Duty of his Office, and also in Obedience to a Direction in an Act of the Twentieth of the King, for vesting in his Majesty the Estates of certain Traytors, &c. and for ascertaining



ing and satisfying the lawful Claims and Debts thereupon, which provides,
 " That the King's Advocate, or in his Absence his Majesty's Solicitor General in
 " Scotland, shall, and they are thereby impowered and required to provide for
 " making proper Answers and Defences on Behalf of his Majesty to all such
 " Claims as shall be offered as aforesaid, and for reversing, affirming or amend-
 " ing the Decrees that shall be passed upon such Claims as they shall see Cause"—
 And the Appellant prays that the said Interlocutor and Decree may be re-
 versed, varied or amended by your Lordships, for the following among
 other

R E A S O N S.

To support the Claim, two Things were insisted on for the Respondents,
viz.

That the *Clan Act* subsisted no longer than the Rebellion of 1715.

That if it did, yet this Settlement, for Payment of Debts, and Provision for
 Wife and Children, was for onerous Causes.

As to the former, there are no Words which limit the Time to that par-
 ticular Rebellion, but they equally extended to every Rebellion in Favour
 of the Pretender; and tho' the Preamble to the Act is founded on an
Invasion then in View, that is no more than is the Case of most general
 Laws occasioned by particular Mischiefs.

Nor is there any Thing impracticable or hard in such an Intent of the Le-
 gislature, that whoever should think of committing Treason in Favour of the
 Pretender, should know before Hand, the Consequence it would be to his
 Family, and that it was not in his Power to secure his Estate to them.

And in a late Case of *Fargubarson*, it was determined by the Lords of Ses-
 sion themselves, that the *Clan Act* was still subsisting in another Part of it
 equally liable to the same Objection, arising from the immediate View to
 the then expected Rebellion, that is, the Clause in Favour of dutiful Su-
 periors or Over-Lords, to whom the Lands of Forfeiting Tenants or Vassals
 were given.

As to the second Question, it is humbly apprehended that the Respondent
 cannot in any Sense claim the Estate for an onerous Cause, which means
 nothing but for a valuable Consideration.

So far as the Debts are real and bona fide, the Creditors will not be pre-
 judiced: But the Respondent claims the Equity of Redemption, for no
 Consideration; and that is the only Thing in Question, and it is the Set-
 tlement of that only which is made void by the Clause in Question.

*For these and other Reasons, the Appellant humbly hopes
 the Interlocutor or Decree appealed from shall be reversed,
 varied or amended, and such Relief given on Behalf
 of his Majesty in the Premises, as to your Lordships in
 your great Wisdom and Justice shall seem meet.*

D. RYDER.

WILLIAM GRANT.

W. MURRAY.

His Majesty's Advocate, or } Appellant.
Behalf of His Majesty, . . . }

James Boyd, and others, . . . Respondents.

The Appellant's CASE.

To be heard at the Bar of the House of
LORDS, on Wednesday the 27th Day of
March 1751.

For these and other Reasons, the Appellant humbly hopes
the Interlocutor or Decree appealed from shall be reversed,
reversed or amended, and such Relief given on Behalf
of his Majesty in the Premises as to your Lordships in
your great Wisdom and Justice shall seem meet.

D. RYDER.
WILLIAM GRANT.
W. MURRAY.

So far as the Debits are well and lawfully due, the Creditors will not be pre-
judiced: But the Respondent claims the Equity of Redemption, for no
Consolidation; and that is the only Thing in Question, and it is the Es-
timation of that only which is made void by the Clause in Question.

nothing but for a certain Consolidation.
cannot in any sense be
applied to the Clause, which means

that the Respondent

of Over-Lending, or of

the Clause in Question, that is, the Clause in Favour of defaulting De-

bitors, that the Clause was still a thing in another sense of it

And in a late Case of *Bankers*, it was determined by the House of

That, and that it was in his Power to give his Estate to them.

But, as the Respondent claims the Equity of Redemption, it must be to the

Equity, that whatever *Bankers* think of retaining the Equity of Redemption

There is there something in the Clause, or said in such an interest of the

I am, accordingly, *Bankers* *Bankers*.

There is then in View, that is no more than is the Case of *Bankers* *Bankers*.

of the *Bankers*, and the *Bankers* to the *Bankers* is a thing in

As to the former, there are no Words which limit the Time to that

That is, that the Clause is limited to the *Bankers* of 1745.

To support the Claim, two Things were insisted on for the Respondent.

First, the Clause is limited to the *Bankers* of 1745.

Secondly, that, and that the Clause is limited to the *Bankers* of 1745.

That the Clause is limited to the *Bankers* of 1745.